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No. 86-1134

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioners VGS Corporation, d/b/a Southland Oil Company, and Globe Asphalt Co., Inc. ("Southland") submit this Reply Brief pursuant to Rule 22.5 of the Rules of this Court.

ARGUMENT

I. CONTRARY TO THE GOVERNMENT'S ASSERTION, THE APPLICABILITY OF SOVEREIGN IMMUNITY IS DETERMINED BY THE EFFECT OF THE JUDGMENT, NOT THE IDENTITY OF THE PARTIES

The Department of Energy ("DOE") urges in its Opposition that simply because Southland's suit is against an agency of the United States government, an award of

interest to Southland is barred by sovereign immunity unless the government has consented to the payment sought. Opp. at 10.

DOE is in error: the mere naming of an agency or officer of the United States government as a defendant has never been the sole determinant of whether the sovereign immunity doctrine applies. In *Miller v. Robertson*, 266 U.S. 243 (1924), for example, the Court held sovereign immunity inapplicable to an award of interest in a suit brought against two officers of the United States government: the Alien Property Custodian and the Treasurer of the United States. The Court held that "[w]hile the *suit* . . . is one against the United States, the *claim* was not against it." *Id.* at 257 (emphasis added). Since *Miller*, this Court repeatedly has held that the application of the sovereign immunity doctrine turns not on "the denomination of the party defendant," *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949), but rather on the "essential nature and effect of the proceeding." *Land v. Dollar*, 330 U.S. 731, 738 (1947) (citations omitted). Thus, the sovereign immunity issue here is not whether Southland's *suit* is against the United States, but whether its *claim*, considering its nature and effect, would operate against the sovereign. As the following discussion demonstrates, DOE's Opposition distorts the nature and effect of Southland's interest claim.

II. BY MISCHARACTERIZING THE OVERCHARGE FUNDS FROM WHICH SOUTHLAND'S INTEREST WOULD BE PAID, THE GOVERNMENT HAS MISAPPLIED THE PRINCIPLES OF SOVEREIGN IMMUNITY ESTABLISHED BY THIS COURT

Until its attempt to raise the shield of sovereign immunity before this Court, DOE had consistently taken the position that it had "no pecuniary interest" in the crude oil overcharge funds from which Southland's interest would be paid, *see Coline Gas Corp.*, 9 DOE

¶ 82,508, at 85,052 (1981), and that those moneys "are not public funds." *Placid Refining Co.*, 14 DOE ¶ 85,111, at 88,199 n.1 (1986). It now makes the contrary assertion: "[t]he prejudgment interest petitioners claim would have to be paid out of money that would otherwise belong to the federal government and remain in the treasury." Opp. at 10.

In support of this revisionist view of the overcharge funds, DOE relies upon the provisions of the settlement agreement approved in *In re DOE Stripper Well Exemption Litigation*, M.D.L. No. 378 (D. Kan.). DOE argues that since the federal government received a portion of the overcharge funds under the agreement and since the agreement commits DOE to pay exception relief and any court-ordered interest on such relief from "its share" of the overcharge funds, Southland's claim on the overcharge funds is barred by sovereign immunity. Opp. at 10-11.

Contrary to the representations in DOE's Brief, the interest claims of exception relief recipients will not be paid from the general fund of the U.S. Treasury under the *Stripper Well* settlement. As the District Court wrote in approving the settlement, "[f]unds received by the DOE will be deposited in the United States Treasury *or will be held in reserve* to meet the DOE's obligation to fund entitlements exception relief." *In re DOE Stripper Well Exemption Litigation*, 653 F. Supp. 108, 113 (D. Kan. 1986) (emphasis added).

DOE also neglects to tell this Court that the legality of the federal government's claim on the *Stripper Well* overcharge funds depends entirely on its position as a legitimate proxy for the millions of private consumers who were injured by crude oil overcharges but whose individual claims on the funds could not be determined. In the *Stripper Well* proceeding, after the Temporary Emergency Court of Appeals ("TECA") determined

that crude oil producers were liable for stripper well overcharges,[1] the District Court's task on remand was to determine how best to effect restitution of the funds to private parties who were injured by the overcharges, a proceeding which the Court described as "a monumental interpleader action. . . ." *In re DOE Stripper Well Exemption Litigation*, 578 F. Supp. 586, 589 (D. Kan. 1983). In approving the settlement, the District Court wrote, "TECA's decision made it clear that the escrow funds represented crude oil overcharges and would need to be distributed *to or for the benefit of injured parties.*" *In re DOE Stripper Well Exemption Litigation*, 653 F. Supp. at 110 (emphasis added). The District Court approved the payment of a portion of the overcharge funds to the federal government, not because the government itself was an injured party, but rather as an indirect means of making whole injured consumers. Thus, the Court described the settlement as providing "a major portion of the funds to the States and to the federal government *on behalf of the consuming public.*" *Id.* at 116 (emphasis added). In its "Statement of Modified Restitutionary Policy," issued to implement the *Stripper Well* settlement, DOE itself interpreted the Agreement as providing for payment of overcharge funds to the States and the Federal government "as representatives of the energy consuming public." 51 Fed. Reg. 27899, 27900 (Aug. 4, 1986).

Thus, the *Stripper Well* settlement strongly supports petitioners' argument that the overcharge funds are not properly considered public funds, but rather private funds held by the government as custodian for ultimate distribution to injured parties. The government's assertion that it was resisting petitioners' claim to the overcharge funds "on its own behalf" (Opp. at 14) distorts

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[1] *See In re DOE Stripper Well Exemption Litigation*, 690 F.2d 1375 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 1127 (1983).

its legal relationship to those funds. The government could not assert a right to those funds "on its own behalf," but rather only on behalf of a class of injured private parties to whom payment of overcharge funds to the government would constitute indirect restitution.[2]

Significantly, DOE comes close to conceding its merely custodial relationship to the overcharge funds when it argues that the government had a "claim" on the overcharge funds "insofar as it had a duty to ensure that they were paid to the proper party" and was resisting petitioners' claim to those funds in the exercise of that duty. Opp. at 14. In so describing its relationship to the overcharge funds, DOE puts this case on all fours with this Court's decisions in *Miller v. Robertson*, *supra* and *Henkels v. Sutherland*, 271 U.S. 298 (1926), in which the Court affirmed awards of interest accruing on escrowed funds in the possession of the federal government. In those cases, as here, the government had a duty to ensure that the escrowed funds were distributed to parties with legitimate claims on those funds. In those cases, as here, the government resisted the payment of accrued interest on those funds to a party already determined by the government to have such a claim. The government's traditional immunity from interest liability was held inapplicable in *Miller* and *Henkels*. It is equally inapplicable here.[3]

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[2] Indeed, the government could not claim the *Stripper Well* interpleader funds, or any other overcharge funds, on its own behalf without raising the identical Constitutional problem addressed by this Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In that case, the Court held that the State of Florida could not claim for itself interest which had accrued on a court-escrowed interpleader fund because to do so would have transformed, by *ipse dixit*, private property into public property without compensation in violation of the Fifth Amendment to the Constitution.

[3] DOE's efforts to distinguish *Miller* and *Henkels* (Opp. at 12-13 n.6) are unavailing. The Department's uncertainty as to

The government's relationship to the overcharge funds distinguishes this case from *United States v. N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947). Unlike the overcharge funds and the seized enemy assets in *Miller* and *Henkels*, the customs duties in *N.Y. Rayon* were collected not for the benefit of private claimants, but for the federal government alone. As such, the government recognized no obligation to invest those funds for the benefit of others and there is no indication in the Court's opinion, or in the lower court opinions, that any interest had accrued on the funds while they remained in the government's possession.[4] In contrast, both DOE and the courts have recognized DOE's obligation to invest the overcharge funds and to distribute to proper claimants their share of the interest accrued.[5] Here, the funds

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whether the government, as opposed to the enemy defendants, had to pay the interest award in *Miller* is answered by the opinion itself: "The enemy defendants did not appear in the case; and it has been stipulated that the decree will not be enforced against them personally." 266 U.S. at 247. DOE's further comment that the plaintiff's claim in *Miller* was not against the United States merely echoes petitioners' argument that in *Miller*, as here, although the suit was against the United States, the plaintiff's claim was not. DOE also suggests that *Henkels* is somehow distinguishable because Southland's interest claim is for a period prior to DOE's October 1985 internal accounting decision to transfer funds necessary to pay Southland's adjudicated exception relief to a separate escrow. DOE ignores the fact that the overcharge funds from which the Southland exception relief money was segregated had themselves been earning interest long before October 1985. *See* note 5 *infra*. Thus, in this case, as in *Henkels*, the funds involved had been invested by the government and the government withheld from the plaintiff the interest that had accrued.

[4] Indeed, if the effect of *N.Y. Rayon* was to permit the government to retain for itself interest that actually accrued on the customs duties after the determination that the duties did not belong to the government, this result would be inconsistent with this Court's later ruling in *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra*. *See* note 2 *supra*.

[5] The DOE regulations governing distribution of refunds to injured parties from the overcharge funds provide for placement

were invested and interest was earned. This also distinguishes *United States v. Louisiana*, 446 U.S. 253 (1980), in which the United States was held not liable for interest payments on disputed lease revenues precisely because those revenues were not invested and neither its escrow agreement with Louisiana nor anything else imposed a duty on the United States to invest those proceeds.

DOE can cite no case in which this Court has invoked the sovereign immunity doctrine to bar an interest award to be paid from funds collected and invested by the government solely for the benefit of others. In *Miller* and *Henkels*, this Court refused to do so. TECA's holding is therefore an unprecedented and unwarranted expansion of the sovereign immunity doctrine.

The sovereign immunity issue in this case is raised every time the government acts as a custodian, stakeholder or trustee as to funds which it is holding for the benefit of rightful private claimants. As described in Southland's Petition[6] and in the supporting *amicus curiae* briefs,[7] the government's custodial role recurs in

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of the funds in "an appropriate interest-bearing account," 10 C.F.R. § 205.287 (1986), and for payment of refunds "plus any accumulated interest." 10 C.F.R. § 205.286 (1986). Moreover, TECA has held that DOE has a statutory duty to refund overcharge monies to injured parties "with interest." *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 723 (Temp. Emer. Ct. App.), *cert. denied*, 459 U.S. 877 (1982). The *Stripper Well* escrow itself contained millions of dollars in accrued interest which ultimately was distributed through the settlement agreement on which DOE relies. *See In re DOE Stripper Well Exemption Litigation*, 578 F. Supp. at 589.

[6] *See* Petition for Writ of Certiorari at 18 n.12, *VGS Corp. v. DOE* (No. 1134).

[7] *See* Brief of Amicus Curiae Beacon Oil Company in Support of Petition for Writ of Certiorari at 15-16, *VGS Corp. v. DOE* (No. 1134); Brief of Amicus Curiae Consumers Power Company in Support of Petition for Writ of Certiorari at 9-11, *VGS Corp. v. DOE* (No. 1134).

a variety of policy contexts, ranging from the regulation of radioactive waste, to the compensation of crime victims, to the administration of escrow accounts by courts themselves. The Court of Appeals' decision in this case is an invitation to the government to invoke the sovereign immunity doctrine to bar any claim for interest accruing on such accounts made by those for whose benefit the funds are held. The holding below therefore has implications reaching far beyond the particular regulatory context in this case.

III. THE GOVERNMENT HAS MISINTERPRETED THE SCOPE OF THE 1976 AMENDMENT OF THE ADMINISTRATIVE PROCEDURE ACT ABOLISHING THE SOVEREIGN IMMUNITY DEFENSE IN ACTIONS OTHER THAN FOR MONEY DAMAGES

The government maintains that the broad abolition of the sovereign immunity defense in the 1976 amendment to § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (1982), does not apply here, citing the statutory exclusion from chapter 7 of the APA for "functions exercised under" the Emergency Petroleum Allocation Act ("EPAA"). *See* 12 U.S.C. § 1904 note (1982), as incorporated by 15 U.S.C. § 754 (1982).

The problem with DOE's argument is that the granting of exception relief from the entitlements program, or any other EPAA program, was not a "function exercised under" the EPAA, but rather was done pursuant to the mandate of § 504(a) of the Department of Energy Organization Act to make "adjustments" to the EPAA programs where necessary to alleviate "special hardship, inequity, or unfair distribution of burdens." 42 U.S.C. § 7194(a) (1982). Indeed, DOE admitted the applicability of the APA to its exception relief function when it argued to the District Court that "the only limitation . . . on the agency's discretion as to when Southland . . . would actually receive [exception relief] funds is con-

tained in the Administrative Procedure Act." Defendants' Response to Plaintiffs' Motion for Summary Judgment at 4, *VGS Corp. v. DOE* (S.D. Miss., filed Aug. 19, 1985) (No. J81-0170(B)). The District Court found DOE's inaction on Southland's relief to violate both the Department of Energy Organization Act and the APA (Appendix at 23a) and DOE did not appeal that ruling.

DOE's additional argument that Southland's claim for interest is a claim for "damages" also contradicts the agency's position below. Before TECA, DOE argued that Southland's suit was a claim for "regulatory relief," not "damages." Brief of Defendants-Appellants at 23, *VGS Corp. v. DOE* (Temp. Emer. Ct. App., filed Jan. 31, 1986) (No. 5-119). DOE cannot have it both ways. If Southland's claim for exception relief was not for damages, then neither is its claim for the interest that accrued on that relief during the period of DOE's inaction. Moreover, if this were a claim for damages against the government, it presumably would be paid from public funds. As argued above, Southland's interest claim, just as its exception relief, would be paid from funds acquired by the government only for the benefit of private parties with legitimate claims under the regulatory program.

Petitioners do not claim that the 1976 APA Amendment affects the traditional rule, articulated by this Court most recently in *Library of Congress v. Shaw*, 106 S. Ct. 2957 (1986), that sovereign immunity bars the recovery of interest as an element of damages against the United States without the government's consent. Petitioners claim rather that § 702 of the APA means exactly what it says: sovereign immunity is not a defense in any suit against an agency or officer of the United States government "seeking relief *other than money damages*. . . ." 5 U.S.C. § 702 (1982) (emphasis added). Since this is not a suit for money damages, sovereign immunity is no defense.

By invoking sovereign immunity against Southland's claim, TECA frustrated the purpose of the 1976 APA Amendment to strengthen available private remedies against governmental misconduct. Even now, DOE refuses to face the reality of its own wrongdoing, writing that the lower courts merely "expressed dismay" at its procrastination (Opp. at 16 n.8), in the face of a District Court holding that DOE's failure to restore Southland's relief was "totally frivolous" (Appendix at 20a) and a TECA opinion finding its actions "simply . . . beyond belief." Appendix at 7a. This case is one of gross governmental misconduct for which a remedy has been denied due to the assertion of sovereign immunity. This is precisely the result Congress sought to avoid in its 1976 Amendment of § 702.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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